FILED
OCT 6 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 390

346 U.S.
STO-SU
69

WILLIAM STOFFEL,

Petitioner,

against

THE NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VICTOR BRUDNEY,
Counsel for Petitioner.

JOSEPH J. SILVERMAN,
BENJAMIN H. SIFF,
Of Counsel.

SUBJECT INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitution and Statutes Involved	3
Statement	3
Reasons for Granting the Writ	10
Conclusion	19
Appendix	20

Cases Cited

Atlantic Coast Line R. Co. v. Pidd, 197 F. 2d 153 (C. A. 5, 1952) cert. denied 344 U. S. 874 17

Boston & M. R. R. v. Coppellotti, 167 F. 2d 201 11
Braun v. Buffalo General Electric Co., 200 N. Y. 484 .. 16
Broderick v. Cauldwell-Wingate Co., 301 N. Y. 182 16

Christensen v. Hannon, 230 N. Y. 205 16
Cone v. West Virginia Pulp & Paper Co., 330 U. S. 212 11
Cummings v. Whitney, 203 F. 2d 354 ..... 13, 14
Davis Frozen Foods, Inc. v. Norfolk Southern Ry. Co., 204 F. 2d 839 (C. A. 4) 18
Diederich v. American News Co., 128 F. 2d 144 (C. A. 10, 1942) 17

AUG 9 1955

217315

PAGE

Erie R. Co. v. Tompkins, 304 U. S. 64 ..... 17, 18

Galloway v. United States, 319 U. S. 372 10
Globe Liquor Co. v. San Roman, 332 U. S. 571 11
Goodall Co. v. Sartin, 141 F. 2d 427 (C. A. 6, 1944), cert. denied 323 U. S. 709 17
Gorham v. Mutual Benefit Health & Accid. Ass'n, 114 F. 2d 97 (C. A. 4, 1940), cert. denied 312 U. S. 688 17
Guttierez v. Public Service Interstate Transp. Co., 168 F. 2d 678 (C. A. 2, 1948) 16, 17

Herron v. Southern Pacific Co., 283 U. S. 91 17
Hickock v. Auburn Light, Heat & Power Co., 200 N. Y. 464 16

Johnson v. New York, New Haven and Hartford R. R. Co., ... U. S. ....., 97 L. Ed. 76 ..... 13, 14

Kaplan v. 48th Ave. Corp., 267 App. Div. 272 16

Lavender v. Kurn, 327 U. S. 645 10
Lennig v. New York Life Ins. Co., 122 F. 2d 871 (C. A. 3, 1941) 17
Lowry v. Seaboard Airline R. Co., 171 F. 2d 625 (C. A. 5, 1948) 17

Montgomery Ward & Co. v. Duncan, 311 U. S. 243 11
Myers v. Reading Co., 331 U. S. 477 10

Nicholson v. Greeley Square Hotel Co., 227 N. Y. 345 .. 16
Nolley v. C., M., St. P. & P. R. Co., 183 F. 2d 566 (C. A. 8, 1950), cert denied 340 U. S. 913 17

Stoner v. New York Life Ins. Co., 311 U. S. 464 17

PAGE

Tennant v. P. & P. U. Ry. Co., 321 U. S. 29 10
Thomas v. Solvay Process Co., 216 N. Y. 265 16

Waldron v. Aetna Casualty & Surety Co., 141 F. 2d 230 (C. A. 3, 1944) 17
Wilkerson v. McCarthy, 336 U. S. 53 7

Zuppa v. Central Hudson Gas & Electric Corp., 302 N. Y. 827 16

Other Authorities

Constitution of the United States:
Seventh Amendment 3, 17, 20

Federal Rules of Civil Procedure, Rule 50(b) 2, 3, 10, 18, 20

Title 28, U. S. C., Sec. 1254 2

United States Supreme Court Rule 38(5)(b) 14

Annual Report of the Director of the Administrative Office of the U. S. Courts, 1950, 1951, 1952 15

Clark, State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins, 55 Yale L. J. 267 18

Gorrell and Weed, Erie Railroad: Ten Years After, 9 Ohio State L. J. 276 ..... 17, 18

66 Harvard Law Review (1953) 1516 ..... 17, 18

5 Moore's Federal Practice, §§38.09, 38.10 ..... 17, 18

Morgan, Choice of Law Governing Proof, 58 Harv. L. Rev. 153 18

Parker, Erie v. Tompkins in Retrospect, An Analysis of its Proper Area and Limits, 35 A. B. A. J. 19 18

IN THE

Supreme Court of the United States

October Term, 1953

No. .....

WILLIAM STOFFEL,

Petitioner,

against

THE NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, William Stoffel, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered June 23, 1953, (1) reversing the judgment for petitioner entered on a jury verdict and the orders of the United States District Court for the Eastern District of New York which denied respondent's motions for a directed verdict and for judgment notwithstanding the verdict and (2) directing the District Court to enter judgment for respondent.

Opinions Below

The District Court (Rayfiel, J.) rendered no opinion. The opinion of the Court of Appeals (A. N. Hand, J., with Swan, C. J. and Chase, J.) (R. 528-531) is reported at 205 F. 2d 411.

Jurisdiction

The judgment of the Court of Appeals was entered on June 23, 1953 (R. 531-532). A timely petition for rehearing (R. 533-543) was filed on July 1, 1953 (R. 533) and was denied by the Court of Appeals on July 13, 1953 (R. 544-545). The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code.

Questions Presented

1. Whether the Court of Appeals for the Second Circuit, in ordering entry of judgment against a party for whom a jury has found a verdict, erroneously measured its power conclusively to upset the verdict, after the trial judge had denied motions for a directed verdict and for judgment notwithstanding the verdict, by a standard which conflicts with the limitations this Court has placed upon the power of Courts of Appeals, under the Seventh Amendment of the Constitution of the United States and the Federal Rules of Civil Procedure, to upset a jury verdict and order entry of final judgment.

2. Whether the Court of Appeals for the Second Circuit incorrectly measured its power to upset a jury's ver-

dict and to order entry of final judgment for the party against whom the jury found the verdict by the local law of New York rather than by federal standards derived by this Court in the light of the command of the Seventh Amendment of the Constitution of the United States and the Federal Rules of Civil Procedure.

Constitution and Statutes Involved

The provisions of the Seventh Amendment of the Constitution of the United States and of Rule 50(b) of the Federal Rules of Civil Procedure, adopted by this Court pursuant to the Act of June 19, 1934 (c. 651, 48 Stat. 1064), are set forth in the Appendix, page 20, *infra*.

Statement

On March 27, 1951, while engaged at work waterproofing a large crate on a flat car in respondent's Harlem River Yards, petitioner, a 20-year old boy, was struck by the current from the 11,000 volt overhead wires in the yards. Petitioner emerged from months of hospitalization, surgery, and treatment, practically blind and so deformed and disabled as to make him a life-long cripple (R. 254-261). On December 12, 1952, after a 9 day trial on a complaint charging respondent with negligence, a jury in the United States District Court for the Eastern District of New York found a verdict for petitioner and awarded him damages of $160,000. The trial judge denied respondent's motions for a directed verdict and for judgment notwithstanding the verdict. On June 23, 1953, the United States Court of

Appeals for the Second Circuit overturned the jury's verdict, reversed the judgment entered thereon, and ordered the case remanded with directions to enter judgment for the respondent on the ground that the evidence did not support the verdict and in its opinion petitioner was guilty of contributory negligence.

The uncontroverted evidence in the record discloses that on the morning of March 27, 1951, petitioner and an older man, Leo Hamlin, were directed by their employer, the Jerome F. Gould Corporation, to waterproof a crate of machinery which had been loaded on a flat car located on a track known as Jersey 7 in respondent's Harlem River Yards (R. 14, 17, 246). Petitioner and Hamlin arrived at the yards at about 11:30 in their employer's station wagon with the tar paper, tools and equipment to be used in waterproofing (R. 15-16). Petitioner, the junior employee, remained in the station wagon while Hamlin got out and went into the respondent's office to ascertain the location of the car (R. 16, 247). There was some difficulty and he had to consult several yard officials in various parts of the yard, but he finally located the flat car, returned to the station wagon and in accordance with directions given to him by respondent's employees, drove it alongside the car (R. 16-25). It then being about 12:15 P. M. petitioner and Hamlin took time out for lunch (R. 26). The latter, who brought his lunch with him, ate in the station wagon; petitioner went out of the yards for his lunch (R. 26, 248).

At about 12:45, Hamlin, having finished his lunch, began to prepare for the work, removing the tools and stepladder from the station wagon (R. 26). Proper protection against rain required waterproofing the crate, which was 16 feet long, 9½ feet wide, and 10½ feet high,

on the top and on all sides from top to bottom (Ex. A, R. 487). The overhead wires which carried the current for the movement of trains in the yards were 15 feet 10 inches above the floor of the flat car and, therefore, approximately 5 feet 3 inches above the top of the crate (compare Ex. A, R. 487, with R. 356-359).

Respondent had covered the crate with tarpaulin while it was in the yards pending waterproofing. Hamlin's first task was to remove the tarpaulin. He placed the ladder alongside the crate, climbed to the top and started tugging at the tarpaulin (R. 27). Petitioner, on returning from lunch at about 5 minutes past one (R. 250), saw Hamlin thus engaged on the top of the crate, and at Hamlin's request assisted him by dragging at the tarpaulin from the bottom of the crate (R. 27-28, 248-250). When the tarpaulin was removed, Hamlin came down, and he and petitioner cut the tar paper into proper lengths, and then he returned to the top of the crate and petitioner started to hand rolled-up strips to him (R. 29-30, 251). Because the wind was blowing the paper around as Hamlin was nailing it down, he asked petitioner to help tack the paper down (R. 252). To do this, petitioner climbed to the top of the crate and after about a minute and a half tacking down the paper in a kneeling position (R. 252-253, 373-379), as petitioner testified, something "just hit me and that was all" (R. 253). In point of fact, the full force of the current from the wires hit petitioner, the upper part of his face and right ear being most badly burned (R. 242), and the jolt hurling him off the crate to the bottom of the flat car (R. 31). Petitioner did not regain consciousness until he was in the hospital (R. 253).

No one saw the incident. Hamlin was facing the opposite direction (R. 31), and other persons engaged in work about the yard saw only the flash and petitioner's body on the floor of the flat car (R. 373). Petitioner testified that he did not touch the wire (R. 274-275). Although one of respondent's employees testified that human flesh and hair was found on the wire above the place where petitioner had been working (R. 194-195), there was no direct evidence as to whether petitioner first came into contact with the wire or whether, as was possible (R. 403), the current jumped across the space between the wire and petitioner, and he then fell against the wire.

There can be no question that respondent was negligent in failing to have de-energized the wires over Track Jersey 7. Respondent's employees in charge of, and engaged in de-energizing, freely admitted that ordinary rules of safety required that the overhead wires be de-energized before work was performed on the crate (R. 93, 114-115, 193, 365-366). And respondent had a regular procedure for de-energizing where safety required it (R. 185-186, 175-176). Indeed, in this very case, respondent's yard officials, knowing that petitioner and Hamlin were going to work on top of the crate, attempted to have the wires de-energized. The accident occurred between 1:15 and 1:30 P. M. (R. 82, 106). From 11:45 A. M. on (R. 337-341, 303) respondent's employees attempted to obtain the required de-energization of the wires but failed, because in calling the telephone number of the person charged with de-energizing, they were dialing the wrong number and never got an answer (R. 99-100, 144-147; *cf.* 175). However, there is no question that if they had dialed the established code number to be used when the electric switchman was

not at his regular station, they would promptly have obtained the requisite de-energization (R. 175-176, 186, 192).

While there was little or no conflict on the issue of respondent's obligation, and its carelessness in failing, to de-energize the wire, there was considerable dispute over whether petitioner was contributorily negligent. On that question, the following evidence favorable to petitioner (*cf. Wilkerson* v. *McCarthy*, 336 U. S. 53), was presented to the jury:

1. Although Hamlin spoke to several of respondent's supervisory employees, explaining the work he and petitioner were to do on top of the car (R. 16-25), and others of respondent's employees conversed with them when he was on top of the crate (R. 296-303, 374-379), at no time did any of respondent's employees or anyone else warn Hamlin (or even claim to have warned petitioner) of the danger lurking in the wires, or caution them against working on top of the crate, or advise them to wait until the wire was de-energized or that the wire could or would be de-energized (R. 24-25, 29, 68-69, 296-303, 310-311, 325-326, 379).

2. Even an experienced railroad employee could not tell whether the wires were alive merely by looking at them (R. 301). Although petitioner who had never worked in an electrified railroad yard before (R. 247), and had limited education (R. 244-245) and experience (R. 281), realized the danger in the wires if they were alive (R. 278) and sought to avoid contact with them (R. 275), he did not consider that the wires, on which there were no signs (R. 365) might be alive (R. 274). He assumed that they were dead (R. 268-269, 273-274), in view of the fact that he saw

Hamlin working on top of the crate in close proximity to the wires when he returned from lunch (R. 248), that at the outset he was told by Hamlin that they had gotten the okay for the job from the railroad yard officials (R. 247), and that he believed that Mr. Gould, his boss, would not send him to a place where he could be hurt (R. 273).

3. No one had seen petitioner come into contact with the wire; it was possible that petitioner was injured by the current jumping rather than by direct contact with the wire (R. 403).

Although there was evidence to establish that Hamlin had been warned about the current in the wire (R. 69-70, 371-372), Hamlin denied having received any such warning (R. 24-25, 29, 68-69), and although Hamlin stated that apart from any concern with electrification, he had told petitioner to avoid the wire (R. 72, 82-83), petitioner denied this (R. 254, 267).

On this state of the record the trial judge charged, on the issue of contributory negligence, that petitioner "could not be indiscriminate in his work and in his movements. He is obliged to exercise reasonable care in doing his work, and you are to determine whether he was guilty of such a want of care, based on all the evidence in the case, as would justify your finding that he was guilty of contributory negligence * * *" (R. 453). Although respondent excepted to other portions of the charge (R. 464-465), it did not except to that portion of it dealing with contributory negligence.

The jury found for petitioner and awarded him $160,000 in damages (R. 466). At the close of petitioner's case, respondent had moved for a directed verdict on the

ground, among others, that petitioner was guilty of negligence in going to the top of the crate in such close proximity to the energized wire (R. 286). The motion was denied (R. 287). Immediately after the verdict, respondent moved to set aside the verdict and for judgment notwithstanding the verdict; both motions were denied (R. 467).

Respondent appealed to the United States Court of Appeals for the Second Circuit. That court reversed the judgment of the District Court entered on the jury's verdict, and ordered judgment to be entered for respondent on the ground that it deemed petitioner to have been contributorily negligent and, therefore, that respondent's motion for a directed verdict and its motion for judgment notwithstanding the verdict should have been granted. The court's conclusion as to petitioner's negligence rested upon two considerations. Petitioner had made no inquiry as to whether the wire had been de-energized, and the court thought his failure to make such inquiry was based solely on the assumption "that his employer would not send him into a place where he might be hurt." On this point, the court stated "[w]e do not think a reasonable man with due regard for his own safety would make this assumption, particularly in view of the grave danger that existed if it was erroneous. * * * The failure of the plaintiff to take an elementary precaution for his own safety by inquiring whether the wire was de-energized before starting to work near it was in our opinion contributory negligence as a matter of law." (R. 529)

However in spite of its strong language as to petitioner's failure to inquire about de-energization, the court did not appear to believe that petitioner was for that rea-

son alone guilty of negligence. It went on to say that "[w]hile it is not negligent *per se* to work near a high tension wire, reasonable care must be exercised"; and, stating that it found "plaintiff's testimony that he did not touch the wire * * * not credible", the court concluded that "we do not think that the plaintiff exercised care commensurate with the grave danger which he knew would exist if the wires were alive in raising up from his kneeling position, as he must have done in order to come into contact with the wire. * * *". Thus its conclusion as to petitioner's contributory negligence rested ultimately on its disbelief of his testimony and its own inference that he failed to exercise care "in raising up from his kneeling position". (R. 530)

Reasons for Granting the Writ

FIRST: The decision below conflicts with this Court's decisions, which rigorously confine the Court of Appeals' power to overturn a jury verdict and order entry of final judgment. Although under Rule 50(b) of the Federal Rules of Civil Procedure a federal court has the power to overturn a verdict and direct entry of final judgment, it may do so "only when there is a complete absence of probative facts to support the conclusion reached by the jury" (*Lavender* v. *Kurn*, 327 U. S. 645, 653) or when the jury's verdict is "without support in the evidence" (*Tennant* v. *P. & P. U. Ry. Co.*, 321 U. S. 29, 35; see also *Myers* v. *Reading Co.*, 331 U. S. 477). Deep rooted historical considerations[1] underlie the narrow scope allowed even the trial judge to terminate the case by conclusively rejecting

[1] See *Galloway* v. *United States*, 319 U. S. 372.

a jury's verdict. Even narrower scope exists for an appellate court. Because it is the trial judge and not the appellate court "who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart" his is "the primary discretionary responsibility" to determine whether to upset a jury's verdict and to order a new trial or a final judgment. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212, 216; *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571. The rigor of the resultant limitations on the appellate court's power to direct entry of final judgment contrary to a jury's verdict is accentuated by comparison with the less confining limitations upon its power to order a new trial, and thus to offer the plaintiff an opportunity to correct a deficiency of proof. *Cf. Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 251; *Boston & M. R. R.* v. *Coppellotti*, 167 F. 2d 201, 204 (C. A. 1, 1948).

That the Court of Appeals for the Second Circuit misconceives its power to overturn a jury's verdict and order the entry of final judgment, is apparent from its disposition of this case, as well as from its rulings in other cases. The court's conclusion that the jury *was required* to find that petitioner was contributorily negligent rests on two grounds: (1) petitioner's "failure to inquire as to whether the wire had been de-energized" and (2) its disbelief of petitioner's testimony and its own inference that petitioner failed, while working so close to the live wires, to exercise "care commensurate with the grave danger which he knew would exist if the wires were alive".

Since as the court conceded, "it was not negligent *per se*" for petitioner to work so close to the wires, its first proposition did not rest on any general legal premise—

i.e., that all men working near high voltage wires must inquire as to whether they are de-energized—but on the particular facts here involved—*i.e.*, that in the circumstances of this case petitioner should have inquired as to de-energization. But that determination presents a question which is pre-eminently for the jury, particularly in this case where the facts of record show that petitioner was truthfully told by Hamlin at the outset that they had gotten the okay for the job from yard officials; petitioner, on returning from lunch, saw Hamlin working on top of the crate in close proximity to the wires; and petitioner was never warned or in any way admonished about the wires by experienced railroad employees who saw both petitioner and Hamlin on top of the crate and conversed with the latter. Whether in such circumstances, a workman like petitioner should have refused to go up on the crate to engage in the performance of his work until he made involved inquiries as to de-energization or else be deemed negligent, is plainly a jury question. Certainly, in view of the facts of record in this case it cannot be said that "there is a complete absence of probative facts to support the conclusions reached by the jury" that petitioner was not contributorily negligent.

The second proposition on which the court's decision rested reflects an even greater disregard of the limitations on its power over jury verdicts than does the first. The court's finding that petitioner's testimony was "not credible" and its statement that "we do not think that the plaintiff exercised care commensurate with the grave danger which he knew would exist if the wires were alive *in raising up from his kneeling position, as he must have done in order to come into contact with the wire*" (italics

added) constitute an unalloyed exercise by it of the jury's function. Nobody saw how petitioner was injured, and the only person testifying thereto, petitioner, testified that while he was on his knees working, something just hit him. The only evidence in the record on the question whether petitioner raised himself from his knees, supplied both by petitioner (R. 253) and by respondent's witness (R. 374), contradicts the court's inference that petitioner "must have" raised himself from his kneeling position. Not only is it possible for petitioner, who was 6 ft. 2 in. tall (R. 246), to have come into contact with the wires while exercising care fully commensurate with the danger involved in working so close to live wires, but it is also possible that petitioner was injured by a spark jumping from the wire, and for petitioner to have fallen against the wire as a result of the shock. On the state of the record, the court's bald determination that petitioner "must have" raised from his kneeling position and come into contact with the wire by a "voluntary movement" of his body and that his testimony was "not credible" has less support in the record than the jury's conclusion that petitioner was not negligent. In view of the relative functions of court and jury on this issue, the court's overturning of the jury's verdict and dismissal of the action was an unequivocal intrusion into the area reserved for the jury.

This is not the only case to evidence the Court of Appeals' overzealousness in dismissing actions in the teeth of juries' verdicts. Only last term, in *Johnson* v. *New York, New Haven and Hartford R. R. Co.*, ... U. S. ....., 97 L. Ed. 76, this Court reversed the court below (194 F. 2d 194) for improperly dismissing an action after a jury verdict for the plaintiff. More recently, in *Cummings* v.

Whitney, 203 F. 2d 354, as well as in this case, the court below has shown a sweeping disregard for juries' findings. The shocking result of this case alone suggests that the Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision" (United States Supreme Court, Rule 38(5)(b)). And its reasoning in reaching its result[1] is instinct with the same basic inappreciation of the limitations on its power conclusively to dispose of a case contrary to the jury's verdict as was exhibited in cases as dissimilar as the *Johnson* and *Cummings* cases.

The importance of correcting the misconception now prevailing in the Second Circuit as to the relationship of the court to a jury's verdict is underscored by the significance of negligence litigation in the business of the federal courts, and in the Second Circuit in particular. During recent years, more than 50% of the diversity business and 40% of the non-government federal question business in

---

[1] *E. g.*, the court, which was bound to look at the evidence most favorable to petitioner, stated that the only reason plaintiff gave for having failed to inquire as to whether the wire had been de-energized "was that he had assumed that his employer would not send him into a place where he might be hurt" (R. 529) and that this assumption was unwarranted as a matter of law. The court simply ignored the facts presented to the jury—that the railroad yard officials had okayed the job, that petitioner was so informed by Hamlin, that when petitioner returned from lunch he saw Hamlin on top of the crate, that nothing was ever said to him about the overhead wires and that in the circumstances, it was reasonable for him to assume, and to state that he assumed, that his employer would not send him into a place where he might be hurt and that there was no danger in working so close to the wires. A less obvious, but no less firm, reluctance to allow full scope to the jury is reflected in the court's inconsistent assertions that petitioner was guilty of contributory negligence "as a matter of law" for failing to have inquired as to the de-energization of the wires, but that nevertheless "it is not negligent *per se* to work near a high tension wire".

the United States District Courts[1] and more than 60% of the diversity business and 70% of the non-government federal question business in the Second Circuit[2] concerned personal injury actions. And the Second Circuit has by far the largest volume of such litigation of any of the federal circuits.[3] Therefore, whether in absolute or in relative terms, the prevalence in the Second Circuit of the Court of Appeals' serious misconception of its power over a jury verdict presents a matter of sufficient importance in the administration of the federal courts to call for the exercise of this Court's power of supervision.

SECOND: The indifference of the court below to the limitations this Court's decisions have placed on the scope

---

[1] The non-Government business of the United States District Courts, according to Table C-3 of the Annual Reports of the Director of the Administrative Office of the United States Courts for the years 1950, 1951 and 1952, was as follows:

FEDERAL QUESTION CASES				DIVERSITY CASES		
Total	Jones Act	FELA	Percent of Jones Act and FELA to Total	Total	Personal Injury	Percent of Personal Injury to Total
7,622	2,227	1,231	45.4	15,125	8,548	56.5
6,441	1,734	1,132	44.5	13,474	7,251	53.8
6,743	1,716	1,084	41.5	13,124	6,499	49.5

[2] *Op. cit., supra,* n. 1, p. 15.

FEDERAL QUESTION CASES				DIVERSITY CASES		
Total	Jones Act	FELA	Percent of Jones Act and FELA to Total	Total	Personal Injury	Percent of Personal Injury to Total
2,383	1,497	280	74.5	1,683	1,083	64.3
2,188	1,199	344	70.5	1,616	938	58.0
2,084	1,172	243	67.9	1,458	782	53.6

[3] *Op. cit., supra,* n. 1, p. 15.

of an appellate court's power to overturn a jury's verdict and direct the entry of judgment may be due to its belief, articulated in *Guttierez* v. *Public Service Interstate Transp. Co.*, 168 F. 2d 678, and applied in this case, that in diversity cases its power in this matter is to be measured by local law rather than by Federal law. We believe that even if tested by New York law, the evidence in this case was sufficient to preclude dismissal of the action by an appellate court, and that therefore on the Court of Appeals' premise that New York law governs, the decision below conflicts with local law.[1] But this case presents a much more important question than whether the Court of Appeals has failed to follow local law. That question is whether the power of a federal court not merely to overturn the jury's verdict but to direct entry of final judgment contrary to the verdict is to be governed by local law or by federal law. On that question there is a flat

---

[1] That the Court below misconceived the New York law on the question is apparent from the fact that in the only relevant New York case on which it relied—*Hickock* v. *Auburn Light, Heat & Power Co.*, 200 N. Y. 464—the decision was that the case should go back for a new trial because of the inadequacy of plaintiff's evidence on contributory negligence; there was absolutely no suggestion that the plaintiff's evidentiary shortcomings should result, as here, in the dismissal of the action. We think that the *Hickock* case is not the controlling local law in this situation, particularly in the light of cases like *Zuppa* v. *Central Hudson Gas & Electric Corp.*, 302 N. Y. 827; *Nicholson* v. *Greeley Square Hotel Co.*, 227 N. Y. 345, 349; *Kaplan* v. *48th Ave. Corp.*, 267 App. Div. 272; *Braun* v. *Buffalo General Electric Co.*, 200 N. Y. 484; *Thomas* v. *Solvay Process Co.*, 216 N. Y. 265; *Christensen* v. *Hannon*, 230 N. Y. 205, 208-209; and *Broderick* v. *Cauldwell-Wingate Co.*, 301 N. Y. 182. But even the *Hickock* case leaves little doubt, as we urged below, that under New York law the question of petitioner's contributory negligence was for the jury and that it would have been improper in the New York courts to grant final judgment for respondent contrary to a verdict for petitioner.

conflict among the Courts of Appeals,[1] and the position of the court below conflicts with the import of the decisions here.

This Court pointed out in *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, 94, that "state laws cannot alter the essential character or function of a federal court, * * * [which] * * * is not in any sense a local matter"; and it ruled that whether a verdict on a given issue in a trial could be directed or whether the question should be left for the jury was to be determined in the light of the requirements of the Seventh Amendment, not the varying requirements of state laws. The *Herron* case was decided before *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and whether in light of the latter decision the broadest implications of the former remain valid is doubtful.[2] But the continued vitality of the essential point, that by the command of the Seventh Amendment the test of a federal court's power to interfere with a jury's verdict in a diversity case is

---

[1] *To be governed by federal law*: *Lowry* v. *Seaboard Airline R. Co.*, 171 F. 2d 625 (CA 5, 1948); *Atlantic Coast Line R. Co.* v. *Pidd*, 197 F. 2d 153 (CA 5, 1952), cert. denied 344 U. S. 874; *Diederich* v. *American News Co.*, 128 F. 2d 144 (CA 10, 1942); *Gorham* v. *Mutual Benefit Health & Accid. Ass'n*, 114 F. 2d 97 (CA 4, 1940), cert. denied 312 U. S. 688.

To be governed by local law: *Guttierez* v. *Public Service Interstate Transp. Co.*, 168 F. 2d 678 (CA 2, 1948); *Nolley* v. *C., M., St. P. & P. R. Co.*, 183 F. 2d 566 (CA 8, 1950), cert. denied 340 U. S. 913; *Lennig* v. *New York Life Ins. Co.*, 122 F. 2d 871 (CA 3, 1941); *Waldron* v. *Aetna Casualty & Surety Co.*, 141 F. 2d 230 (CA 3, 1944); *cf. Goodall Co.* v. *Sartin*, 141 F. 2d 427, 433-434 (CA 6, 1944), cert. denied 323 U. S. 709.

[2] See Note, 66 Harv. L. Rev. 1516, 1523-1525 (1953). Although the decision in *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464, has been interpreted to cast a cloud over *Herron* (see *Lennig* v. *New York Life Ins. Co.*, *supra*), it has generally been interpreted as leaving *Herron* untouched and being simply "a novel application of the doctrine of the 'law of the case'." 5 Moore's Federal Practice, §38.10, p. 104; *Gorrell and Weed*, Erie Railroad: Ten Years After, 9 Ohio State L. J. 276, 281-283.

federal, not local, is emphasized by the adoption of the Federal Rules by this Court in the same term in which it decided *Erie*. The unequivocal import of those Rules is that in the federal courts the relationship of judge to jury with respect to the ultimate decision of issues of fact and questions such as are here involved—the credibility of witnesses and the probative force of evidence—is to be governed by federal standards, derived ultimately by this Court in the light of federal constitutional requirements, and is not to vary from state to state. In this case, the court below proceeded on the contrary premise, and thus incorrectly decided an important question, on which there is widespread disagreement among the circuits.

The importance of the question requires no elaboration in this petition. The extensiveness of the conflict among the Courts of Appeals reflects the frequency with which the issue arises. It is implicit in all jury cases reaching the federal courts on diversity grounds, although it may not be crucial where federal and local standards coincide. It has been the subject of frequent and conflicting comment in the literature—by judges, by practicing attorneys, by text writers and others, all of whom point to the necessity for resolution of the question by this Court.[1] Review is now sought here, in No. 178 of this Term, of a decision conflicting with that below, *Davis Frozen Foods, Inc.* v. *Norfolk Southern Ry. Co.*, 204 F. 2d 839 (C. A. 4). The issue is not merely ripe for decision; it imperatively calls for definitive resolution here.

---

[1] See 5 Moore's Federal Practice, §§38.09, 38.10; *Gorrell and Weed, supra*, n. 2, p. 17; *Parker, Erie* v. *Tompkins* in Retrospect, An Analysis of its Proper Area and Limits, 35 A. B. A. J. 19, 84-85; *Clark*, State Law in the Federal Courts: The Brooding Omnipresence of *Erie* v. *Tompkins*, 55 Yale L. J. 267, 289; *Morgan*, Choice of Law Governing Proof, 58 Harv. L. Rev. 153, 173-174; and the cases and authorities collected in Note, 66 Harv. L. Rev. 1516, 1523-1525 (1953).

CONCLUSION

Petitioner respectfully submits that this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

VICTOR BRUDNEY,
Counsel for Petitioner.

JOSEPH J. SILVERMAN,
BENJAMIN H. SIFF,
Of Counsel.

APPENDIX

The Seventh Amendment to the Constitution of the United States provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Rule 50(b) of The Federal Rules of Civil Procedure provides:

Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Supreme Court, U. S.
FILED
NOV 2 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 390

WILLIAM STOFFEL,

Petitioner,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

EDWARD R. BRUMLEY,
Counsel for Respondent,
Room 3841, Grand Central Terminal,
New York, N. Y.

R. M. PEET,
J. D. O'NEILL,
Of Counsel.

THE COURT PRESS, N. Y. C.

INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	1
Constitution and Federal Rule Involved	2
Statement	3
Argument	7
Conclusion	19

TABLE OF CASES CITED:

Allison v. *Great Atlantic & Pacific Tea Co.*, 99 F. 2d 507 (4th Cir. 1938) 17

Anderson v. *Southern Ry. Co.*, 20 F. 2d 71 (4th Cir. 1927) 7

Atlantic Coast Line R. Co. v. *Pidd*, 197 F. 2d 153 (5th Cir. 1952), cert. den. 344 U. S. 874 16

Bonnette v. *Molloy*, 153 App. Div. 73 (1st Dept. 1912), reversed for failure to make findings, 209 N. Y. 168 (1913) 15n

Boston & M. R. R. v. *Coppellotti*, 167 F. 2d 201 (1st Cir. 1948) 11

Brady v. *Southern Ry. Co.*, 320 U. S. 476 (1943) 9n, 10

Braun v. *Buffalo General Electric Co.*, 200 N. Y. 484 (1911) 15n

Broderick v. *Cauldwell-Wingate Co.*, 301 N. Y. 182 (1950) 15n

C., M. & St. P. Ry. v. *Coogan*, 271 U. S. 472 (1926) 9n

Christensen v. *Hannon*, 230 N. Y. 205 (1920) 15n

Cohen v. *Beneficial Loan Corp.*, 337 U. S. 541 (1949) 17

Cone v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212 (1947) 10, 11

PAGE

Conroy v. *Saratoga Springs Authority*, 259 App. Div. 365 (3rd Dept. 1940), affd. 284 N. Y. 723 ..... 6, 7, 14
Cummings v. *Whitney*, 203 F. 2d 354 (1953) 12

Davis Frozen Foods Inc. v. *Norfolk Southern Ry. Co.*, 204 F. 2d 839 (4th Cir. 1953) 18, 19
Diederich v. *American News Co.*, 128 F. 2d 144 (10th Cir. 1942) 16

Eckenrode v. *Pennsylvania R. R.*, 335 U. S. 329 (1948) 9n
Erie R. Co. v. *Tompkins*, 304 U. S. 64 (1938) 17, 18
Ettelson v. *Metropolitan Life Ins. Co.*, 137 F. 2d 62 (3rd Cir. 1943), cert. den. 320 U. S. 777 17

Fitzpatrick v. *International Ry. Co.*, 252 N. Y. 127 (1929) 15

Galloway v. *United States*, 319 U. S. 372 (1943) 10
General Pictures Co. v. *Electric Co.*, 304 U. S. 175 (1938) 8
Globe Liquor Co. v. *San Roman*, 332 U. S. 571 (1948) 11
Goodall Co. v. *Sartin*, 141 F. 2d 427 (6th Cir. 1944), cert. den. 323 U. S. 709 ..... 18n
Gorham v. *Mutual Benefit Health & Accid. Ass'n.*, 114 F. 2d 97 (4th Cir. 1940), cert. den. 312 U. S. 688.. 16
Guaranty Trust Co. v. *York*, 326 U. S. 99 (1945) 13
Gutierrez v. *Public Service Interstate Transp.*, 168 F. 2d 678 (2nd Cir. 1948) 14, 17n

Herron v. *Southern Pacific Co.*, 283 U. S. 91 (1931).. 18
Hickok v. *Auburn Light, Heat & Power Co.*, 200 N. Y. 464 (1911) 14, 15n
Huddleston v. *Dwyer*, 322 U. S. 232 (1944) 8

Johnson v. *New York, New Haven and Hartford R. R. Co.*, 343 U. S. 975 12
Johnson v. *New York, New Haven and Hartford R. R. Co.*, 344 U. S. 48 (1952) 12

Kaplan v. *48th Ave. Corp.*, 267 App. Div. 272 (2nd Dept., 1943) 15n

PAGE

Lavender v. *Kurn*, 327 U. S. 645 (1946) 9
Lennig v. *New York Life Ins. Co.*, 122 F. 2d 871 (3rd Cir. 1941) 18n
Levinson v. *Deupree*, 345 U. S. , 97 L. ed. 869 (1953) 13
Lowry v. *Seaboard Airline R. Co.*, 171 F. 2d 625 (5th Cir. 1948) 16
Lyon v. *Socony-Vacuum Oil Co.*, 268 App. Div. 788 (2nd Dept. 1944), affd. 293 N. Y. 930 14
McSweeney v. *Prudential Ins. Co. of America*, 128 F. 2d 660 (4th Cir. 1942), cert. den. 317 U. S. 658. 17
Midgett v. *Mastropoalo*, 277 App. Div. 792 (2nd Dept. 1950), appeal dismissed 302 N. Y. 687 14
Missouri Pac. R. R. v. *Aeby*, 275 U. S. 426 (1928).... 9n
Montgomery Ward & Co. v. *Duncan*, 311 U. S. 243 (1940) 11
Moore v. *Chesapeake & O. R. Co.*, 340 U. S. 573 (1951) 9n
Myers v. *Reading Co.*, 331 U. S. 477 (1947) 9
N. Y. Cent. R. R. v. *Kinney*, 260 U. S. 340 (1922).... 8
New York Central R. R. v. *Ambrose*, 280 U. S. 486 (1930) 9n
Nicholson v. *Greeley Square Hotel Co.*, 227 N. Y. 345 (1919) 15n
Nolley v. *Chicago, M., St. P. & P. R. Co.*, 183 F. 2d 566 (8th Cir. 1950), cert. den. 340 U. S. 913 ..... 18n
Occidental Life Ins. Co. v. *Thomas*, 107 F. 2d 876 (9th Cir. 1939) 17
Palmer v. *Hoffman*, 318 U. S. 109 (1943) 15
Rohrbacher v. *Gillig*, 203 N. Y. 413 (1911) 14
Tennant v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29 (1944) 9
Thomas v. *Solvay Process Co.*, 216 N. Y. 265 (1915).. 15n
Waldron v. *Aetna Casualty & Surety Co.*, 141 F. 2d 230 (3rd Cir. 1944) 18n
Wilkerson v. *McCarthy*, 336 U. S. 53 (1949) 10, 13
Zuppa v. *Central Hudson Gas and Electric Corp.*, 302 N. Y. 827 (1951) 15n

OTHER AUTHORITIES CITED:

PAGE

38 Cornell Law Quarterly, Notes, p. 450, n. 9 (1953).. 11

Federal Employers' Liability Act 9, 9n, 10, 11

Federal Rules of Civil Procedure 2, 14, 18
Rule 50 (b) 2, 7, 10, 11, 12, 15, 16

66 Harv. L. Rev. Notes, p. 1523 (1953) 18

McElwain, "The Supreme Court's Business Under Hughes," 63 Harv. L. Rev. 5, 13, n. 14 (1949).... 8

5 Moore's Federal Practice, § 38.09, pp. 99-100 17

Prosser, Torts, § 52, p. 393 6

Restatement of Torts, § 463 6

Rules, Supreme Court of the United States, Rule 38 (5) (b) 12

United States Constitution, Seventh Amendment..2, 14, 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 390

WILLIAM STOFFEL,

Petitioner,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The District Court rendered no opinion. The opinion of the Court of Appeals, Second Circuit (R. 528-531), is reported at 205 F. 2d 411.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

1. Whether the Court of Appeals for the Second Circuit, in ordering entry of judgment against a party

for whom a jury has found a verdict, erroneously measured its power conclusively to upset the verdict, after the trial judge had denied motions for a directed verdict and for judgment notwithstanding the verdict, by a standard which conflicts with the limitations this Court has placed upon the power of Courts of Appeals, under the Seventh Amendment of the Constitution of the United States and the Federal Rules of Civil Procedure, to upset a jury verdict and order entry of final judgment.

2. Whether the Court of Appeals for the Second Circuit incorrectly measured its power to upset a jury's verdict and to order entry of final judgment for the party against whom the jury found the verdict by the local law of New York rather than by federal standards derived by this Court in the light of the command of the Seventh Amendment of the Constitution of the United States and the Federal Rules of Civil Procedure.

While petitioner presents these two questions, respondent will argue that neither question is involved in a consideration of the petition.

Constitution and Federal Rule Involved

The provisions of the Seventh Amendment of the Constitution of the United States and of Rule 50 (b) of the Federal Rules of Civil Procedure are set forth in the Appendix of the petition, page 20.

Statement

Petitioner, not an employee of respondent, suffered personal injuries when he came in contact with an electric wire while working on top of a crate placed on a flat car in respondent's Harlem River Yards.

On the morning of March 27, 1951 Leo Hamlin, a packer of all kinds of shipments for the Jerome F. Gould Corporation, received instructions from his employer to go to the Harlem River Yards of the New Haven Railroad with William Stoffel, the petitioner (R. 13-14). Hamlin, a witness called by the petitioner, testified that they were told they would have to waterproof a case. To do that it was necessary to bring nails and lumber and waterproof paper (R. 15). Hamlin said that he drove a station wagon to the Willis Avenue entrance of the freight yard and left Stoffel in it. This was between 11:20 and 11:30 in the morning of a clear day (R. 15-16). After learning from respondent that the flat car, with a case on it, was on track Jersey 7, Hamlin drove the station wagon alongside of the car, and ate his lunch, while petitioner went to a restaurant (R. 16-26). About a quarter to one Hamlin started to unload the material from the wagon, placed a ladder on the flat car against the case, untied the tarpaulin and went on top of the case (R. 25-27).

Plaintiff's Exhibit 7 (R. 478) shows the station wagon alongside of the flat car (R. 220), and defendant's Exhibit F (R. 494) shows sheets of paper covering and on top of the case (R. 73). Defendant's Exhibits G, H and I (R. 496-500) show the case loaded on the car and the overhead wires (R.

195). Defendant's Exhibits N and O and plaintiff's Exhibit 10 show warning signs (R. 510, 512, 484, 222-240, 364-365, 387-395), about twenty in number, in substance warning of live wires, danger, 11,000 volts, and to keep away. With Hamlin, petitioner drove to the Willis Avenue entrance, then to the Lincoln Avenue entrance and into the yard. Petitioner used the Lincoln Avenue entrance to go to lunch and return. The signs were visible to a person in an auto or on foot (R. 24, 212, 264, 364, 387-395).

The wire was five feet, 9½ inches above the case. The petitioner was six feet, 2 inches in height, so that the wire was 4½ inches below the top of his head (R. 356-359, 246).

Hamlin testified that about quarter to one plaintiff returned, worked on the ground pulling tarpaulin alongside of the car (R. 28). They took measurements of the case and the paper to cover the case, and cut the paper. Petitioner went up the ladder and pushed up to Hamlin the paper and strips of lumber (R. 29-30). When the accident occurred Hamlin was on his hands and knees with his back toward the ladder.

He did not know that petitioner was on top, had not directed him to come up on the case (R. 72). After the accident he crawled to end of case and saw Stoffel lying on his back on the end of the car, at the foot of the case (R. 31).

Petitioner testified that he was on top of the case a minute or a minute and a half when the accident occurred, and was putting additional nails into a lath already fastened by Hamlin (R. 253, 270). He was

about four feet from the end of the case, which had the ladder against it (R. 283).

Hamlin told petitioner that if he should come around on top of the box to keep away from the wire. "I told him to keep away from the wire" (R. 72, 82-83).

Petitioner noticed the wire when he got on the box (R. 268). "It was just about when I was starting to pull myself up on my stomach to get up on my knees, I happened to look up and I seen it there" (R. 267). He thought it was an electric wire but took it for granted that it was dead (R. 268-269), and did not consider that the electric wire might be alive (R. 274). In his deposition petitioner testified that he knew for a fact that if the wire was alive contact might be dangerous (R. 278). In his deposition he also admitted he had been taught, knew definitely, that a wire carrying electricity might be dangerous (R. 285). When asked whether he made any effort to find out from anybody whether the electric wire was dead, his only excuse was that he did not think Mr. Gould, his boss, would send him to a place where he could get hurt (R. 273).

Petitioner

(1) saw the wire,

(2) took it for granted it was an electric wire,

(3) knew that contact with the wire would be dangerous, if alive, and

(4) did not know whether it was alive.

The upper part of petitioner's face and his right ear were most severely burned (R. 241-243). The

wire had a spot on it, about four inches long, with burned hair or skin on it. This spot was about three feet from the end of the case (R. 194-195). In this connection an outside engineer testified, based on condition of the atmosphere on the day of the accident, that 11,000 volts would strike or jump less than a half inch (R. 400-403). His testimony was uncontradicted.

This case has all the elements of contributory negligence as a matter of law.

The opinion of Circuit Judge Augustus Hand says that the plaintiff was guilty of contributory negligence because

(1) plaintiff had seen the wire and knew it would be dangerous if alive,

(2) plaintiff failed to inquire whether the wire was de-energized,

(3) plaintiff failed to exercise care commensurate with the known grave danger in placing himself in close proximity to the wire.

There can be no dispute as to the common test of contributory negligence, under local and federal law. It is "conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection." Prosser, *Torts,* § 52, p. 393; *Restatement of Torts,* § 463. "Where one voluntarily subjects himself to a peril known to him or generally observable by a person of ordinary prudence in his situation he cannot recover damages sustained thereby." *Conroy* v. *Saratoga Springs Au-*

thority, 259 App. Div. 365, 368 (3rd Dept. 1940), affd. 284 N. Y. 723.

"A man has no right to be careless and reckless in the face of open and apparent danger [in this case known and appreciated], and if he proceeds under such circumstances he is guilty of contributory negligence to a degree that bars a recovery." *Anderson* v. *Southern Ry. Co.,* 20 F. 2d 71, 73 (4th Cir. 1927).

Argument

On the uncontradicted evidence petitioner was guilty of contributory negligence as a matter of law, under both local and federal tests. The decision below is not in conflict with this Court's decisions on the power to order entry of final judgment. Admittedly the court has the power when the verdict is without support in the evidence. The decision below does not exceed the power of an appellate court, and the case is of consequence only to the particular parties.

If there was no jury question as to contributory negligence the Court of Appeals had the power to direct a judgment under Rule 50 (b) of the Federal Rules of Civil Procedure. The decision does not present a question of power, does not involve conflict between the circuits, and is not in conflict with decisions of this Court. There is no issue that calls for resolution here.

Petitioner's real complaint is not based on conflict with decisions of this Court or conflict with decisions among the Courts of Appeals or the power of the court below to do what it did, but is based on criticism of the decision below in finding, on the evidence, that

plaintiff was guilty of contributory negligence. This case involves nothing more than that, and for no reason warrants the granting of the petition for certiorari.

The petition lacks substantial grounds because it turns upon the particular facts involved. Sufficiency of evidence does not ordinarily induce granting of a writ. *N. Y. Cent. R. R.* v. *Kinney,* 260 U. S. 340, 346 (1922). "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Pictures Co.* v. *Electric Co.,* 304 U. S. 175, 178 (1938). See McElwain, "The Supreme Court's Business Under Hughes," 63 Harv. L. Rev. 5, 13, n. 14 (1949). "The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts, . . ." *Huddleston* v. *Dwyer,* 322 U. S. 232, 237 (1944).

I

The first reason for granting the writ is stated to be that the decision below conflicts with this Court's decisions with respect to the power to order entry of final judgment (petition, pp. 10-15).

Petitioner admits (p. 10) the power of a federal court to overturn a verdict and direct entry of final judgment when the verdict is without support in the evidence, and then says that the power has limitations and that the Court of Appeals has misconceived the power, and that it is important to correct this

serious misconception. If the verdict was without support in the evidence then the Court of Appeals on proper motion, had the power to overturn it and direct entry of final judgment. On that power, under such circumstances, federal law imposes no limitations.

Petitioner demonstrates no real conflict in the application of rules of law. This first reason amounts to a claim of wrong decision on the particular facts, not to a conflict of decisions. The attempt is made (petition, p. 11) to raise this case from the particular to the general by asserting that the disposition proves that the Court of Appeals misconceived its power.

Petitioner cites (p. 10) three cases under the Federal Employers' Liability Act in support of the assertion of conflict with this Court's decisions. In *Lavender* v. *Kurn*, 327 U. S. 645 (1946), the facts were in dispute, and fair-minded men might have drawn different inferences (pp. 653-654). In *Tennant* v. *Peoria & P. U. Ry Co.*, 321 U. S. 29 (1944), it was held that it could not be said that the inference drawn by the jury that respondent's negligence caused the fatal accident was without support in the evidence (p. 35). In *Myers* v. *Reading Co.*, 331 U. S. 477 (1947), it was held that the evidence was sufficient to support the verdict (p. 486). These decisions do not evidence any conflict with the decision below.[1]

It is submitted, moreover, that cases under the Federal Employers' Liability Act do not fit into the

[1] In the following cases under the Federal Employers' Liability Act this Court found no negligence. *C., M. & St. P. Ry.* v. *Coogan*, 271 U. S. 472 (1926); *Missouri Pac. R. R.* v. *Aeby*, 275 U. S. 426 (1928); *New York Central R. R.* v. *Ambrose*, 280 U. S. 486 (1930); *Brady* v. *Southern Ry. Co.*, 320 U. S. 476 (1943); *Eckenrode* v. *Pennsylvania R. R.*, 335 U. S. 329 (1948); *Moore* v. *Chesapeake & O. R. Co.*, 340 U. S. 573 (1951).

usual pattern of negligence suits, and involve the interpretation of a federal statute, with the necessity for a uniform federal rule. See *Brady* v. *Southern Ry. Co.,* 320 U. S. 476, 479 (1943). The courts turn to federal law to determine the nature or character of a federally-created right of action. *Wilkerson* v. *McCarthy,* 336 U. S. 53 (1949). All these cases under the Federal Employers' Liability Act called for analysis of the facts and did not involve the question of power.

Petitioner refers (p. 10) to *Galloway* v. *United States,* 319 U. S. 372 (1943), to support the statement that historical considerations underlie the narrow scope allowed to terminate the case by rejecting a jury's verdict. In *Galloway* it was found that the evidence was legally insufficient to sustain a verdict for petitioner. The opinion says (p. 389):

> "If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure. Cf. Rule 50; *Berry* v. *United States,* 312 U. S. 450. The objection therefore comes too late."

Continuing the academic treatment petitioner refers to four cases in support of the statement that even narrower scope exists for an appellate court. (1) *Cone* v. *West Virginia Pulp & Paper Co.,* 330 U. S. 212, 216 (1947). Rule 50 (b) gives the trial

court his last chance to correct his own errors and order a new trial or direct the entry of judgment. While this primary discretionary responsibility rests on the District Court, this does not narrow the scope of the power of the appellate court to do the same thing on appeal. In *Cone* the Court of Appeals did not have power to direct entry of judgment because there had been only a motion in the trial court for a directed verdict and no motion for judgment under Rule 50 (b). (2) *Globe Liquor Co.* v. *San Roman,* 332 U. S. 571 (1948). The case went back to the District Court for a new trial because respondents made no motion for judgment under Rule 50 (b). The opinion says that it is important to have the District Court first pass upon whether there should be a new trial or judgment finally ending the controversy. (3) *Montgomery Ward & Co.* v. *Duncan,* 311 U. S. 243, 251 (1940). Under Rule 50 (b) the District Court should pass upon both the motion for a new trial and that for judgment notwithstanding the verdict. This permits the appellate court to review both motions. (4) *Boston & M. R. R.* v. *Coppellotti,* 167 F. 2d 201, 204 (1st Cir. 1948). Action was brought under the Federal Employers' Liability Act. Defendant moved for a directed verdict. The court reserved decision. The jury brought in a verdict for plaintiff. The motion for a directed verdict was denied and defendant appealed from the judgment. The Court of Appeals remanded the case to the District Court to determine whether a new trial should be granted or judgment notwithstanding the verdict entered. The Court of Appeals did not have power to direct entry of judgment based on a motion for a directed verdict. See 38 Cornell Law Quarterly, Notes, p. 450, n. 9 (1953). These four cases denied power to the appellate court because of failure to

comply with Rule 50 (b). Here respondent complied with the Rule and the appellate court was under no consequent limitation.

To support the claim of overzealousness by the Court of Appeals petitioner mentions (pp. 13-14) *Johnson* v. *New York, New Haven and Hartford R. R. Co.*, 344 U. S. 48 (1952) and *Cummings* v. *Whitney*, 203 F. 2d 354 (1953).

In the *Johnson* case this Court held that, in the absence of an express motion for judgment notwithstanding the verdict, the Court of Appeals did not have the power to direct entry of judgment for the defendant. Certiorari was limited to the application of Rule 50 (b). 343 U. S. 975. In the *Cummings* case the opinion by Judge Chase points out that there was no evidence to afford a basis for an inference that the deceased looked before he started to cross the street or while he was going across. The Court of Appeals applied Vermont law under which appellee had to prove affirmatively that no negligence of deceased contributed to the proximate cause of his death, and also Vermont law as to what acts constituted contributory negligence as a matter of law. Having found appellee's case short of proof the Court of Appeals reversed the judgment and directed entry of judgment for the appellant.

The authorities relied upon do not "evidence the Court of Appeals' overzealousness" (petition, p. 13), or "a sweeping disregard for juries' findings," or a "shocking result," or "basic inappreciation of the limitations on its power" (p. 14). But petitioner makes these assertions to invoke Rule 38 (5) (b) of this Court.

Petitioner attempts to show the importance of this case because of "the significance of negligence litigation in the business of the federal courts, and in the Second Circuit in particular" (petition, p. 14). After *Guaranty Trust Co.* v. *York,* 326 U. S. 99 (1945) and *Levinson* v. *Deupree,* 345 U. S. , 97 L. ed. 869 (1953), the question in this case is not of importance "for the disposition of litigation in the federal courts." *Guaranty Trust Co.* case, page 101. This case turns upon its own special facts and is of consequence only to the particular parties. See concurring opinion of Mr. Justice Frankfurter in *Wilkerson* v. *McCarthy, supra,* 336 U. S. 53, 66-67 (1949). To grant the petition in this case would open the door to a vast number of cases involving only the evaluation of facts, and lacking further significance.

II

For his second reason for granting the writ the petitioner alleges that the Court of Appeals measured its power to overturn a verdict and direct the entry of judgment, by local law rather than by federal law; that the case presents the question whether the power is governed by local or by federal law (petition, pp. 15-18).

The Court of Appeals did not measure its power by local law. The case does not present the question whether the power is governed by local law. In his requests to charge on contributory negligence (R. 426-429), in his brief in the Court of Appeals (pp. 16-18), in his petition for rehearing (R. 534-542), the petitioner relied on New York law with respect to the matter of proof. The Court of Appeals applied the New York law to the question of proof of freedom

from contributory negligence. Respondent interprets the petition to relate to the question of power of the appellate court—whether federal or local law should apply. Of course the Seventh Amendment and the Federal Rules command a federal test of power (petition, pp. 17-18).

Petitioner alleges (p. 16) that in both *Gutierrez* v. *Public Service Interstate Transp.*, 168 F. 2d 678 (2nd Cir. 1948) and in this case the Court of Appeals measured its power to direct entry of judgment by local law. Both cases involved sufficiency of evidence, not power to direct entry of judgment. Petitioner digresses to allege that the decision below conflicts with New York law with respect to evidence, that *Hickok* v. *Auburn Light, Heat & Power Co.*, 200 N. Y. 464 (1911) is not the controlling New York law, that even in the *Hickok* case the question of contributory negligence was for the jury. "Confusion worse confounded."

New York law on contributory negligence is no different from federal law. A person is under the duty to exercise ordinary care. He must conform to the standard of conduct of a reasonably prudent man under like circumstances. If he anticipates the danger and unnecessarily subjects himself to it, he may not recover. *Hickok* v. *Auburn Light, Heat & Power Co., supra,* 200 N. Y. 464 (1911); *Rohrbacher* v. *Gillig,* 203 N. Y. 413 (1911); *Conroy* v. *Saratoga Authority, supra,* 259 App. Div. 365 (3rd Dept. 1940), affd. 284 N. Y. 723; *Lyon* v. *Socony-Vacuum Oil Co.,* 268 App. Div. 788 (2nd Dept. 1944), affd. 293 N. Y. 930; *Midgett* v. *Mastropoalo,* 277 App. Div. 792 (2nd Dept. 1950), appeal dismissed 302 N. Y. 687. In New York, proof of freedom from contributory negligence is

more than burden of proof, it is a substantive part of plaintiff's right to recover. *Fitzpatrick* v. *International Ry. Co.*, 252 N. Y. 127, 133-134 (1929). Federal courts in diversity of citizenship cases must apply local law with regard to the issue of contributory negligence. *Palmer* v. *Hoffman*, 318 U. S. 109, 117 (1943). The petition fails to mention this important aspect of the case, and refers loosely to federal standards (petition, pp. 17-18).[2]

Finally petitioner comes to the matter of claimed conflict among the Courts of Appeals (p. 17). The power of a federal court to direct entry of final judgment contrary to a verdict is governed by federal law. The cases cited by petitioner (p. 17, n. 1, first paragraph) so hold. The court below so held in accordance with Rule 50 (b) of the Federal Rules of

---

[2] New York cases cited by petitioner (p. 16, n. 1): *Zuppa* v. *Central Hudson Gas and Electric Corp.*, 302 N. Y. 827 (1951), employer's knowledge of conditions not imputed to employee; *Nicholson* v. *Greeley Square Hotel Co.*, 227 N. Y. 345 (1919), defendant did not sustain burden to prove decedent's negligence; *Kaplan* v. *48th Ave. Corp.*, 267 App. Div. 272 (2nd Dept., 1943), experience led plaintiff to think there was no danger; *Braun* v. *Buffalo General Electric Co.*, 200 N. Y. 484 (1911), deceased did not know nature of wire or lack of proper insulation; *Thomas* v. *Solvay Process Co.*, 216 N. Y. 265 (1915), contributory negligence fact question because of particular facts; *Christensen* v. *Hannon*, 230 N. Y. 205 (1920), here again case decided on particular facts; *Broderick* v. *Cauldwell-Wingate Co.*, 301 N. Y. 182 (1950), plaintiff ordered by superior to proceed under dangerous conditions.

With reference to *Hickok* v. *Auburn Light, Heat & Power Co.*, *supra*, 200 N. Y. 464, it should be noted that an appellate court, in New York, did not, until 1912, have authority to grant final judgment which in its opinion should have been granted by the trial court in jury cases where the evidence was insufficient to require the submission of the case to the jury. See *Bonnette* v. *Molloy*, 153 App Div. 73, 77-81 (1st Dept. 1912), reversed for failure to make findings, 209 N. Y. 168 (1913). The petition (p. 16, n. 1, referring to the *Hickok* case) fails to mention the New York statutory situation in 1911, which results in an incorrect conclusion based on an incorrect premise.

Civil Procedure. There is no conflict. The cases cited by petitioner as in conflict (p. 17, n. 1, first paragraph) do not deal with the power of the court but with sufficiency of evidence as to which local law controls. The court below reviewed the New York law. There is no conflict. This case is in accord with both groups, one group covering procedural matters, the other group substantive matters. Petitioner has raised a false issue. There is no conflict among the Courts of Appeals which calls for decision. In *Lowry* v. *Seaboard Airline R. Co.,* 171 F. 2d 625 (5th Cir. 1948), the court applied the comparative negligence statute of Florida in an analysis of the evidence and added (p. 630): "Whether a verdict should be directed in a federal court is a matter of federal law, having to do with the right of jury trial under the Constitution of the United States." In *Atlantic Coast Line R. Co.* v. *Pidd,* 197 F. 2d 153 (5th Cir. 1952), *cert. den.* 344 U. S. 874, the court followed the *Lowry* case in consideration of the local statute. In *Diederich* v. *American News Co.,* 128 F. 2d 144 (10th Cir. 1942), the sole question was whether the trial court erred in directing a verdict for defendant on the ground that decedent assumed the risk as a matter of law, in spite of the Oklahoma Constitution which provided that assumption of risk shall be a question of fact. It was held that the state law did not control the power of the judge to pass upon questions of law. In *Gorham* v. *Mutual Benefit Health & Accid. Ass'n.,* 114 F. 2d 97 (4th Cir. 1940), *cert. den.* 312 U. S. 688, the appellate court affirmed a judgment for defendant entered on a directed verdict and treated the power of direction as governed by federal practice.

In substance, these cases hold that "the division of function between court and jury in a federal court

is to be made by federal, not by state law." *Ettelson* v. *Metropolitan Life Ins. Co.*, 137 F. 2d 62, 65 (3rd Cir. 1943), *cert. den.* 320 U. S. 777. The litigant's rights are determined by state law, but he obtains them by the procedure available in all federal courts. 5 Moore's Federal Practice, § 38.09, pp. 99-100. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938), does not affect the procedure. It involved substantive law and not the power of the federal court to direct a verdict.

The case of *McSweeney* v. *Prudential Ins. Co. of America,* 128 F. 2d 660 (4th Cir. 1942), *cert. den.* 317 U. S. 658, also brings out the distinction. It was a suit to cancel a life insurance policy on the ground of fraud. The master and trial judge and Court of Appeals reviewed the facts in the light of the South Carolina law. It was held by the Court of Appeals that whether a verdict should be directed was a matter of federal practice (p. 664). In *Allison* v. *Great Atlantic & Pacific Tea Co.,* 99 F. 2d 507 (4th Cir. 1938), the trial judge directed a verdict for defendants on the ground that plaintiff had failed to show any negligence. The Court of Appeals affirmed, applying local law in determining the rights and duties of the parties. See also *Occidental Life Ins. Co.* v. *Thomas,* 107 F. 2d 876 (9th Cir. 1939). This Court makes clear the distinction in *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541, 555 (1949).

Petitioner cites cases which he alleges hold that the power of a federal court to direct entry of final judgment contrary to the verdict is governed by local law (petition, pp. 16-17, second paragraph of n. 1).[3]

[3] *Gutierrez* v. *Public Service Interstate Transp. Co., supra,* 168 F. 2d 678 (2nd Cir. 1948), followed New York law as to the sufficiency of the evidence to support the verdict, as a matter

These cases do not deal with the power of the court but with sufficiency of evidence and are not in conflict with the decisions of Courts of Appeals cited in note 1, first paragraph, on page 17 of petition.

Petitioner says that the position of the Court of Appeals conflicts with the import of the decisions of this Court (p. 17). The problem arose in *Herron* v. *Southern Pacific Co.,* 283 U. S. 91 (1931), where a state constitutional provision denied the right to take from the jury the issue of contributory negligence, and this Court held that whether a verdict could be directed was to be determined by the requirements of the Seventh Amendment. The decision below, for the reasons discussed above, does not conflict with *Herron* or *Erie R. Co.* v. *Tompkins, supra,* 304 U. S. 64 (1938).

"In a federal court the trial judge must direct a verdict when the evidence is such that a jury could reach only one rational conclusion." 66 Harv. L. Rev., Notes, p. 1523 (1953). Certainly the Court of Appeals had the power to reverse the judgment and remand with directions to enter judgment. It had this power under the Seventh Amendment, and under the Rules of Civil Procedure, as interpreted by this Court.

Petitioner refers (p. 18) to *Davis Frozen Foods Inc.* v. *Norfolk Southern Ry. Co.,* 204 F. 2d 839

---

of substantive law. *Nolley* v. *Chicago, M., St. P. & P. R. Co.,* 183 F. 2d 566 (8th Cir. 1950), *cert. den.* 340 U. S. 913, followed local law as to the insufficiency of the evidence to go to the jury. *Lennig* v. *New York Life Ins. Co.,* 122 F. 2d 871 (3rd Cir. 1941) held that the legal sufficiency of the evidence was to be determined by local law. So held in *Waldron* v. *Aetna Casualty & Surety Co.,* 141 F. 2d 230 (3rd Cir. 1944) and in *Goodall Co.* v. *Sartin,* 141 F. 2d 427 (6th Cir. 1944), *cert. den.* 323 U. S. 709.

(4th Cir. 1953), as in conflict with the decision below. Certiorari was denied on October 12, 1953. The trial judge directed a verdict for plaintiff on the issue of negligence and the jury exonerated plaintiff of contributory negligence. Defendant argued that under the laws of North Carolina a directed verdict in favor of the party having the burden of proof is forbidden. The Court of Appeals held that the question was one of federal and not of state practice. The case is not in conflict with the decision below. This Court did not consider that the issue "calls for definite resolution here" (petition, p. 18).

On the record the Court of Appeals found petitioner guilty of contributory negligence as a matter of law. With petitioner's admitted knowledge of conditions and appreciation of the danger the Court of Appeals could hardly have done otherwise. It committed no error in the application of the proper law with respect to the sufficiency of the evidence. Unquestionably it had the power to direct judgment based on its finding. The petition presents no recognized reason for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD R. BRUMLEY,
Counsel for Respondent.

R. M. PEET,
J. D. O'NEILL,
Of Counsel.

New York, N. Y., October 30, 1953.